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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 GREGORY C. BONTEMPS,

12 Plaintiff,

13 v.

14 NARINDER SAUKHLA,

15 Defendant.
16

No. 2:19-cv-2605 CKD P

ORDER AND FINDINGS AND
RECOMMENDATIONS

17 Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42
18 U.S.C. § 1983.

19 I. Three Strikes Analysis

20 Plaintiff has not yet submitted an application to proceed in forma pauperis in this case nor
21 has he paid the required filing fee of \$350.00 plus the \$50.00 administrative fee. However, as
22 explained below, plaintiff will not be given the opportunity to submit an application to proceed in
23 forma pauperis because he has accrued three strikes under 28 U.S.C. § 1915(g) and he has not
24 shown that he is under imminent danger of serious physical injury. Instead, the court will
25 recommend that plaintiff be required to pay the \$400.00 in required fees or suffer dismissal of the
26 complaint.

27 The Prison Litigation Reform Act of 1995 (PLRA) permits any court of the United States
28 to authorize the commencement and prosecution of any suit without prepayment of fees by a

1 person who submits an affidavit indicating that the person is unable to pay such fees. However,

2 [i]n no event shall a prisoner bring a civil action or appeal a
3 judgement in a civil action or proceeding under this section if the
4 prisoner has, on 3 or more occasions, while incarcerated or detained
5 in any facility, brought an action or appeal in a court of the United
6 States that was dismissed on the grounds that it is frivolous,
malicious, or fails to state a claim upon which relief may be granted,
unless the prisoner is under imminent danger of serious physical
injury.

7 28 U.S.C. § 1915(g). The plain language of the statute makes clear that a prisoner is precluded
8 from bringing a civil action or an appeal in forma pauperis if the prisoner has brought three
9 frivolous actions and/or appeals (or any combination thereof totaling three). Rodriguez v. Cook,
10 169 F.3d 1176, 1178 (9th Cir. 1999). “[Section] 1915(g) should be used to deny a prisoner’s [in
11 forma pauperis] status only when, after careful evaluation of the order dismissing an action, and
12 other relevant information, the district court determines that the action was dismissed because it
13 was frivolous, malicious or failed to state a claim.” Andrews v. King, 398 F.3d 1113, 1121 (9th
14 Cir. 2005). “[W]hen a district court disposes of an in forma pauperis complaint ‘on the grounds
15 that [the claim] is frivolous, malicious, or fails to state a claim upon which relief may be granted,’
16 such a complaint is ‘dismissed’ for purposes of § 1915(g) even if the district court styles such
17 dismissal as denial of the prisoner’s application to file the action without prepayment of the full
18 filing fee.” O’Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008) (second alteration in original).
19 Dismissal also counts as a strike under § 1915(g) “when (1) a district court dismisses a complaint
20 on the ground that it fails to state a claim, (2) the court grants leave to amend, and (3) the plaintiff
21 then fails to file an amended complaint” regardless of whether the case was dismissed with or
22 without prejudice. Harris v. Mangum, 863 F.3d 1133, 1142-43 (9th Cir. 2017).

23 Inspection of other cases filed by plaintiff in this court has led to the identification of at
24 least three cases brought by plaintiff that qualify as strikes. The court takes judicial notice of the
25 following lawsuits filed by plaintiff:¹

26 _____
27 ¹ The court “may take notice of proceedings in other courts, both within and without the federal
28 judicial system, if those proceedings have a direct relation to matters at issue.” United States ex
rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)
(continued)

- 1 1. Bontemps v. McKramel, E.D. Cal. No. 2:06-cv-2483 JAM GGH (complaint dismissed
2 with leave to amend for failure to state a claim, case dismissed on December 22, 2008, for
3 failure to file an amended complaint)
- 4 2. Bontemps v. McKramer, E.D. Cal. No. 2:06-cv-2580 GEB GGH (complaint dismissed
5 with leave to amend for failure to state a claim, case dismissed on August 30, 2007, for
6 failure to file an amended complaint)
- 7 3. Bontemps v. Gray, E.D. Cal. No. 2:07-cv-0710 MCE CMK (complaint dismissed with
8 leave to amend for failure to state a claim, case dismissed on July 5, 2007, for failure to
9 file an amended complaint)
- 10 4. Bontemps v. Lee, E.D. Cal. No. 2:12-cv-0771 KJN (complaint dismissed without leave to
11 amend for failure to state a claim on January 31, 2013)
- 12 5. Bontemps v. Aquino, E.D. Cal. No. 2:12-cv-2406 EFB (complaint dismissed without
13 leave to amend for failure to state a claim on July 9, 2013)

14 All of the preceding cases were dismissed well in advance of the December 24, 2019
15 filing of the instant action and none of the strikes have been overturned. Therefore, this court
16 finds that plaintiff is precluded from proceeding in forma pauperis unless she is “under imminent
17 danger of serious physical injury.” 28 U.S.C. § 1915(g). To satisfy the exception, plaintiff must
18 have alleged facts that demonstrate that she was “under imminent danger of serious physical
19 injury” at the time of filing the complaint. Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir.
20 2007) (“[I]t is the circumstances at the time of the filing of the complaint that matters for
21 purposes of the ‘imminent danger’ exception to § 1915(g).”); see also, Abdul-Akbar v. McKelvie,
22 239 F.3d 307, 312-14 (3rd Cir. 2001); Medberry v. Butler, 185 F.3d 1189, 1192-93 (11th Cir.
23 1999); Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998); Banos v. O’Guin, 144 F.3d 883,
24 885 (5th Cir. 1998).

25 The complaint alleges that plaintiff submitted a staff complaint against defendant Saukhla
26
27 (citation and internal quotation marks omitted) (collecting cases); Fed. R. Evid. 201(b)(2) (court
28 may take judicial notice of facts that are capable of accurate determination by sources whose
accuracy cannot reasonably be questioned).

1 on June 24, 2019, after Saukhla cancelled his referral to podiatry for a replacement CAM boot.
2 (ECF No. 1 at 3.) He claims that he has a right foot fracture that requires an air cast walking boot
3 to allow him to ambulate properly. Id. Plaintiff has also attached an appeal that indicates that he
4 was seen by a podiatrist on December 28, 2018, and issued equipment as recommended by the
5 podiatrist and that he has a chrono for a wheelchair. Id. at 8, 10. Based on these allegations, the
6 court cannot find that plaintiff was under imminent danger of serious physical injury at the time
7 he filed his complaint. It will therefore be recommended that plaintiff be required to pay the
8 filing fee in full or have the complaint dismissed.

9 II. Plain Language Summary of this Order for a Pro Se Litigant


10 You have at least three strikes under § 1915(g) and cannot be granted in forma pauperis
11 status unless you show the court that you were in imminent danger of serious physical injury at
12 the time you filed the complaint. You have not shown that you were in imminent danger of
13 serious physical injury and so it is being recommended that you be ordered to pay the entire
14 \$400.00 in required fees.

15 Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court shall randomly
16 assign a United States District Judge to this action.

17 IT IS FURTHER RECOMMENDED that plaintiff be ordered to pay the entire \$400.00 in
18 required fees within thirty days or face dismissal of the case.

19 These findings and recommendations are submitted to the United States District Judge
20 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
21 after being served with these findings and recommendations, plaintiff may file written objections
22 with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings
23 and Recommendations." Plaintiff is advised that failure to file objections within the specified
24 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
25 (9th Cir. 1991).

26 Dated: January 9, 2020

27 
28 CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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